IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO. 402 OF 2018
IN
COMPANY PETITION NO. 863 OF 2015

Vadraj Cement Limited ... Appellant
(Formerly known as ABG Cements Ltd.)
V/s.
Beumer Technology India Pvt.Ltd. ... Respondent.

WITH
APPEAL (L) NO. 405 OF 2018
IN
COMPANY PETITION NO. 745 OF 2015

Vadraj Cement Limited ... Appellant
(Formerly known as ABG Cements Ltd.)
V/s.
Ernst & Young LLP
(Earlier known as Ernst & Young Pvt. Ltd.) ... Respondent.

WITH
APPEAL (L) NO. 407 OF 2018
IN
COMPANY PETITION NO. 297 OF 2016

Vadraj Cement Limited ... Appellant
(Formerly known as ABG Cements Ltd.)
V/s.
Elecon EPC Projects Limited ... Respondent.

WITH
APPEAL (L) NO. 409 OF 2018
IN
COMPANY PETITION NO. 454 OF 2016

Vadraj Cement Limited ... Appellant
(Formerly known as ABG Cements Ltd.)
V/s.
Dalmia Refractories Limited
(formerly known as Shri Nataraj
Ceramic and Chemical Industries Limited) ... Respondent.

WITH CONNECTED

CHAMBER SUMMONS (L) NO. 1338 OF 2018
WITH CONNECTED
NOTICE OF MOTION (L) NO. 931, 933, 935 and 901 OF 2018

Mr. Vikram Nankani, Sr. Counsel a/w. Mr. Ashish Rao, Mr. Durgaprasad Poojari I/b PDS Legal for the Appellants/Applicants in all the appeals.
Mr. Umesh Gulati a/w. Mr. Deepak Batra and Mr. Shailendra Singh for Respondent in APPL 402/18 and for the Applicant in CSHWL 1338 of 2018.
Mr. Sagar Divekar a/w. Mr. Abhimanyu M. for the Respondent in APPL/405/18.
Mr. Mohan Salain I/b MGS Legal for the Respondent in APPL/407/18.
Mr. A.V. Singh for the Respondent in APPL/409/18.

CORAM : A.S. OKA AND M.S. SONAK, JJ.
DATE : 10th SEPTEMBER 2018.

P.C.:-

1] At the outset, the learned counsel appearing for the respondent in Appeal (L) No. 402 of 2018 states that the said respondent will withdraw the Chamber Summon (L) No. 1338 of 2018 with liberty to file appropriate proceedings in accordance with law. Accordingly, the Chamber Summons is disposed of as withdrawn. All contentions of the parties are kept open.

2] By the impugned judgment and order dated 23rd August 2018, the learned Single Judge disposed of five company petitions praying for winding up of the appellant company. The learned Single Judge made

Company Petition No. 863 of 2015 absolute in terms of prayer clause (a) and (b) thereof. Prayer (a) is for ordering the winding up of the appellant company (ABG Cement Ltd) and the prayer (b) is for appointment of the Official Liquidator as the Liquidator of the appellant company. Appeal (L) No. 402 of 2018 arises out of Company Petition No. 863 of 2015 which was made absolute. As regards the other four company petitions, in view of the order passed in Company Petition No. 863 of 2015, the learned Single Judge disposed of the said company petitions with liberty to the petitioner to file affidavit of proof of debt with Official Liquidator who was directed to consider the same in accordance with law. Liberty was given to the petitioners in the other four company petitions to apply for revival of their petitions in the event the order making Company Petition No.863 of 2015 absolute is recalled or set aside in appeal.

3] The learned senior counsel appearing for the appellant tendered an affidavit of one Imtiyaz Khan, the Company Secretary of the appellant company which is affirmed on 10th September 2018. He submitted that the appellant is not disputing the findings recorded by the learned Single Judge. However, the appellant is relying upon the facts stated in the said affidavit. He pointed out that before the learned Single Judge, a letter dated 1st August 2018 addressed by YES Bank to the appellant was produced, which shows that a proposal of the appellant was under consideration of YES Bank. He submitted that the additional affidavit shows that YES Bank is evaluating the proposal for providing finance to the appellant for payment to financial creditors- capex and working capital has deposited in escrow account of the appellant of Rs.50 crores on behalf of Simcement, which is one of the major shareholders of the appellant. He pointed out that the said amount was utilised by the appellant, by making payment to 9 different banks representing a consortium of the banks. He submitted that this aspect could not be brought to the notice of the learned Single Judge by the appellant. He submitted that the consortium of the bankers had granted time to the appellant to pay the dues payable as per OTS scheme till 30th September 218. He submitted that as far as the petitioners in the company petitions for winding up of the company are concerned, the learned Single Judge in the impugned order has noted that there was a dispute about the sum of Rs.5 crores payable to the petitioner in Company Petition No. 229 of 2015. He submits that certain amounts were paid to the petitioners under the consent terms referred in the impugned order and to show *bonafides,* the appellant is wiling to deposit 10% of the balance amount payable to the petitioners in the company petitions. He submitted that the petitioners in the company petitions do not stand to gain by going ahead with the liquidation of the appellant company and they will be benefited if they agree to postpone the hearing of these appeals. We may note here that the respondents are not consenting to the said suggestion and they want the Court to hear the appeals.

4] We are considered the submissions. It is not in dispute that on 8th February 2018, the appellant entered into the revised consent terms with the petitioner in Company Petition No. 863 of 2018 under which the appellant agreed to pay a sum of Rs.2,31,36,208/-. The appellant has paid sum of Rs.50 lakhs to the said petitioner and the balance amount was to be paid in four monthly installments. It is not in dispute that the appellant committed defaults and further installments were not paid. In fact, the appellant had agreed that in case there is default in payment of four equal monthly installments, the company petition be made absolute in terms of prayer clauses (a) and (b).

5] It appears that an affidavit was filed on behalf of the appellant of Shri Vijay Prakash Sharma dated 18th July 2018. In paragraph 5 of the impugned order, the learned Single Judge has quoted the said affidavit, which reads thus:

> *5 On 19.7.2018 the following order came to be passed :*
> *"1 Shri Thakker tenders and affidavit of Vijay Prakash Sharma, Managing Director and C.E.O. of respondent company affirmed on 18th July 2018 in which paragraphs 8 and 9 read as under :*
>
> > *"8 <u>The Respondent Company was making substantial efforts to reduce its existing liability by reduction of debt due and payable. The Respondent Company approached its Bankers from time to time, to agree to settlement for reduction of the liability. The Bankers in its meeting held on 12th July,2018 have now finally agreed to settle the dues of Rs.3535.39 crores of the Respondent Company at an aggregated amount of Rs.2834 crores as one time settlement.</u> The Respondent was informed during the meeting that the proposal is accepted by all the bankers. <u>The bankers have given time till 30th September 2018 to make payment of OTS amount.</u>*
> >
> > *9. I say and submit that in view of the recent development, the Respondent will be in position to reduce its liability and interest burden accordingly. The Respondent is in advanced talks with various banks and private equity funds to fund the entire one time settlement as well as for capital expenditure/working capital for running the plant which can be utilized for repayment of dues of vendors, like the Petitioners.*

> *I say within three weeks from today, we will have in principle approval from Private Bank/investor for discharging OTS amount and providing further finance to discharge other creditors."*
>
> *(underline supplied)*

6] Thereafter, the learned Single Judge has referred to the letter dated 1st August 2018 addressed to the appellant by YES Bank Ltd. We have perused the said letter. The last paragraph of the said letter records that YES Bank alongwith one or two additional financiers can evaluate the proposal. Moreover it is specially stated that the letter was issued subject to satisfactory due diligence, internal approvals and without prejudice to the rights of the Bank. It is further specifically stated therein that the letter should be taken only as an intent and not as a commitment. In fact, the learned Single Judge noted that the affidavit filed on 18th July 2018 brings on record that the admitted outstanding amounts due and payable by the appellant are in the region of Rs.3535 crores. The letter dated 19th July 2018 issued by Punjab National Bank, which was produced by the appellant before the learned Single Judge, records that one Mr. Rishi Agarwal agreed to pay 85% of the dues outstanding with the bank on behalf of the appellant.

7] As regards the affidavit dated 18th July 2018, the learned Single Judge has observed in paragraph 7, which reads thus:

> *"7. In the affidavit of Vijay Prakash Sharma affirmed on 18.7.2018, Vijay Prakash Sharma who is the managing director and CEO of the company has averred that within 3 weeks the company will have in principal approval from private bank or investors for discharging OTS amounts. Three weeks period came to an end on*

> *9.8.2018. Two weeks have passed since and even today there is no hope of any one coming forward to fund the company.*"

8] The only relevant fact which is pointed out from the affidavit tendered today is the receipt of amount by the appellant in the sum of Rs.50 crores in May 2018 which has come on behalf of the Simcement, a shareholder of the appellant. This payment of Rs.50 crores does not make out any change in circumstances. On the contrary, the affidavit dated 18th July 2018 and affidavit brought on record today show that out of total dues of Rs.3535 crores payable by the appellant to the banks, 85% has to be paid by the appellant and except for the sum of Rs.50 cores, nothing has been paid by the appellant.

9] In fact, only on account of the admitted non-compliance with the consent terms dated 8th February 2018, the learned Single Judge could have made the company petition absolute in view of the clauses in the consent terms. However, the learned Single Judge has considered what is set out in the affidavit dated 18th July 2018 and has recorded a finding that the appellant company is unable to discharge its debts and is commercially insolvent. In this appeal, across the bar, an offer was made to deposit only 10% of the balance amount due as per consent terms dated 8th February 2018. This, in fact, reaffirms the finding recorded by the learned Single Judge that the appellant company is commercially insolvent.

10] Even as of today, there is nothing placed on record to show that there is an assurance by YES Bank that 85% of the amount out of Rs.3535 crores will come from YES Bank.

11] At this stage, the learned senior counsel for the appellant invited our attention to what is recorded in paragraph 14 of the impugned order, which reads thus:-

> *"14. Mr. Gupta tenders photo copy of a letter dated 2.7.2018 from one Roseburg Inc., Mauritius to Punjab National Bank and the background of Roseburg INC, Mauritius from Mr. Deepak Yadav, General Manager-representative of Rose burg who is present in court. The same are taken on record and marked 'X' (colly). All the petitioners are at liberty to make photo copy of this from the court records. Mr.Gupta relying on instructions from Mr. Deepak Yadav-General Manager of Rose burg Inc. and relying on these two documents which are marked 'X' (colly), states that the company is now owned 51% by Rose burg INC and Rose burg INC will settle all the claims of petitioner. Therefore, as last opportunity, 2 weeks time is granted to the company either by itself or through Rose burg or any other party to settle all the outstanding claims of the petitioners who are before the court today. If all the payments are made on or before 7.9.2018, petitions be listed on 10.9.2018 for directions. If not paid, and the Official Liquidator does not receive confirmation from all the petitioners or proof of payment from the company, Liquidator shall start taking further steps under the provision of Companies Act.".*

Admittedly, no payments have been made till today and even the said assurance has not been complied with.

12] Accordingly, we find no merit in the appeals and the same are dismissed with no order as to costs.

13] The pending notices of motion do not survive and the same are disposed of.

14] At this stage, the learned senior counsel appearing for the appellant seeks continuation of the ad-interim order dated 4th September 2018. The prayer is opposed by the respondents. Considering the facts of the case, we direct that the ad-interim order dated 4th September 2018 will continue to operate for a period of two weeks from the date on which this order is uploaded.

(M. S. SONAK, J.) **(A.S.OKA, J.)**